Artic Building and Civil Engineering Sdn Bhd v Ahmad Zaki Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO D4–22–1001 OF 1999
ABDUL MALIK ISHAK J
8 MAY 2009

Civil Procedure — Pleadings — Function of pleadings — Plaintiff had relied on letters not pleaded in its claim — Whether court entitled to make decision on issue which had not been raised by plaintiff in its pleadings

Contract — Assignment — Assignment of debts — Whether plaintiff had proven that there was an assignment of debt

Contract — Goods sold and delivered — Claim for payment — Plaintiff appointed by third defendant to supply sand and earth — Whether plaintiff had right of action against first and second defendants

The first and second defendants, who acted together in a joint venture, were the main contractors in a development project ('the project'), and they appointed the third defendant as their subcontractor. According to the first and second defendants the third defendant had then engaged the plaintiff to supply the sand and the earth for the project. When the plaintiff's demand for payment of the sand and earth supplied for the project were not settled the plaintiff instituted the instant writ action against the defendants. The first and second defendants averred that they were not liable to the plaintiff because the contract appointing the plaintiff to supply sand and earth was only between the third defendant and the plaintiff and the first and second defendants were not parties to that contract. The first defendant further relied on an indemnity clause in the joint venture agreement between the first and second defendants which provided that the second defendant would be solely responsible for the execution of the project and that it would indemnify the first defendant against all losses arising therefrom. The second defendant averred in its amended statement of defence that it had paid directly to the third defendant the whole amount of the project, which the latter admitted receiving, and that this relinquished the second defendant from any liabilities from any actions such as that by the plaintiff. As the third defendant had not contested the suit, judgment in default was entered against it. The main issue for consideration in this action was whether the plaintiff had a right of action against the first and second defendants.

Held, dismissing the plaintiff's claims against the first and second defendants with costs:

(1) The letters of appointment to the plaintiff categorically showed that it was the third defendant who had appointed the plaintiff to supply sand and earth for the project. Thus it cannot be denied that the plaintiff was appointed by the third defendant. This meant that there was no contractual nexus between the plaintiff and the first and second defendants and the latter cannot be held liable for the debts of the third defendant, as a contract cannot confer rights or impose obligations arising under it to any person except the parties to the contract itself (see paras 11, 12, 18, 19 & 29).

(2) Although the director of the plaintiff company had produced evidence of letters which showed that the third defendant had informed the joint venture company of the plaintiff's appointment and requested that the plaintiff be paid for the supply of the sand and earth from the account which the third defendant had with the joint venture company (letters of undertaking), these letters of undertaking were not pleaded by the plaintiff. The plaintiff was therefore precluded from relying on these letters of undertaking to found its claim against the first and second defendants. In any case, there was documentary evidence to show that these letters of undertaking were subsequently revoked by the third defendant and that the plaintiff accepted this revocation (see paras 21, 22 & 25).

(3) Further, there were two letters to show that the second defendant had made the payment for the project to the third defendant and thus there was no basis for the plaintiff's claim against the second defendant. The fact that the second defendant had made the full payment for the project to the third defendant remained undisputed and uncontested by the plaintiff. Thus the plaintiff had failed to prove its case against the first and second defendants on the balance of probabilities (see paras 33–36).

(4) In addition, the amount claimed by the plaintiff had not been consistent. In its statement of claim it had claimed a sum of RM587,029.63 but in a letter to the defendants a sum of RM243,830.62 was recorded. The plaintiff's witness had also failed to give any satisfactory answer as to why there were inconsistencies. These inconsistencies created serious doubts on the validity of the plaintiff's claims against the first and second defendants (see paras 37 & 38).

(5) The plaintiff's contention that there was an assignment of the debt, to the first and second defendants, was entirely baseless and misconceived because the plaintiff had failed to prove that there was an assignment. (see paras 38–40).

[Bahasa Malaysia summary

Defendan pertama dan kedua, yang bertindak bersama dalam satu usaha sama, merupakan kontraktor utama dalam satu projek pembangunan ('projek'), dan mereka melantik defendan ketiga sebagai subkontraktor mereka. Menurut defendan pertama dan kedua, defendan ketiga kemudiannya melantik plaintif untuk membekalkan pasir dan tanah untuk projek tersebut. Apabila tuntutan plaintif untuk bayaran pasir dan tanah yang dibekalkan untuk projek tersebut tidak dilangsaikan plaintif memulakan tindakan writ terhadap defendan-defendan. Defendan pertama dan kedua menegaskan bahawa mereka tidak bertanggungan kepada plaintif kerana kontrak melantik plaintif untuk membekalkan pasir dan tanah hanya di antara defendan ketiga dan plaintif dan defendan pertama dan kedua bukanlah pihak-pihak kepada kontrak tersebut. Defendan pertama seterusnya bergantung kepada klausa tangggungan rugi di antara defendan pertama dan kedua yang memperuntukkan bahawa defendan kedua akan bertanggungjawab sepenuhnya untuk perlaksanaan projek tersebut dan bahawa ia akan melindungi defendan pertama terhadap semua kerugian yang timbul daripadanya. Defendan kedua menegaskan dalam pindaan pernyataan pembelaannya bahawa dia telah membayar keseluruhan jumlah projek tersebut kepada defendan ketiga secara terus, dan defendan ketiga telah mengaku menerimanya, dan bahawa ini telah melepaskan defendan kedua daripada sebarang liabiliti daripada tindakan-tindakan yang dilakukan oleh plaintif. Memandangkan defendan ketiga tidak mencabar guaman tersebut, penghakiman ingkar dikenakan terhadapnya. Isu utama untuk dipertimbangkan dalam tindakan ini ialah sama ada plaintif mempunyai hak bertindak terhadap defendan pertama dan kedua.

Diputuskan, menolak tuntutan plaintif terhadap defendan pertama dan kedua dengan kos:

(1) Surat-surat perlantikan kepada plaintif dengan jelas menunjukkan bahawa defendan ketiga yang melantik plaintif untuk membekalkan pasir dan tanah untuk projek tersebut. Oleh itu tidak dapat dinafikan bahawa plaintif telah dilantik oleh defendan ketiga. Ini bermaksud bahawa tidak terdapat sebarang hubungan kontrak di antara plaintif dan defendan pertama dan kedua dan defendan kedua dan ketiga tidak bertanggungan terhadap hutang-hutang defendan ketiga, memandangkan kontrak tidak memberikan hak atau mengenakan kewajipan di bawahnya kepada sesiapapun melainkan pihak kepada kontrak tersebut (lihat perenggan 11, 12, 18, 19 & 29).

(2) Walaupun pengarah syarikat plaintif telah mengemukakan keterangan surat-menyurat yang menunjukkan bahawa defendan ketiga telah

memaklumkan syarikat usaha sama mengenai perlantikan plaintif dan meminta bahawa plaintif dibayar untuk bekalan pasir dan tanah daripada akaun yang dimiliki defendan ketiga dengan syarikat usaha sama (suart akujanji), surat-surat akujanji tersebut tidak diplid oleh plaintif. Oleh itu plaintif dihalang daripada bergantung dengan surat-surat akujanji tersebut untuk membuat tuntutan terhadap defendan pertama dan kedua. Dalam kes ini, terdapat keterangan dokumen untuk menunjukkan bahawa surat-surat akujanji tersebut telah dibatalkan oleh defendan ketiga dan bahawa plaintif menerima pembatalan ini (lihat perenggan 21, 22 & 25).

(3) Seterusnya, terdapat dua surat untuk menunjukkan bahawa defendan kedua telah membuat bayaran untuk projek tersebut kepada defendan ketiga dan oleh itu tiada asas untuk tuntutan plaintif terhadap defendan. Fakta bahawa defendan kedua telah membuat bayaran penuh untuk projek tersebut kepada defendan ketiga tidak dipertikaikan dan dicabar oleh plaintif. Oleh itu plaintif telah gagal untuk membuktikan kesnya terhadap defendan pertama dan kedua atas imbangan kebarangkalian (lihat perenggan 33–36).

(4) Tambahan lagi, jumlah yang dituntut oleh plaintif tidak konsisten. Dalam pernyataan tuntutannya dia telah menuntut sejumlah RM587,029.63 tetapi dalam surat kepada defendan-defendan sejumlah RM243,830.62 dicatatkan. Saksi plaintif juga gagal untuk memberikan sebarang jawapan yang memuaskan mengenai kenapa terdapat percanggahan tersebut. Percanggahan ini menimbulkan keraguan yang serius ke atas kesahan tuntutan plaintif terhadap defendan pertama dan kedua (lihat perenggan 37 & 38).

(5) Dakwaan plaintif bahawa terdapat penyerahhakkan hutang, kepada defendan pertama dan kedua, adalah tidak berasas dan salah tanggapan kerana plaintif gagal untuk membuktikan berlakunya penyerahhakkan (lihat perenggan 38–40).]

Notes

For a case on claim for payment, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 3805.

For cases on assignment of debts, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2466–2471.

For cases on function of pleadings, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 5421–5423.

Cases referred to

Anlaby & Ors v Praetorius (1888) 20 QBD 764 (refd)

Ayers v Hanson [1912] WN 193 (refd)

Banner Investments Pte Ltd v Hoe Seng Metal Fabrication & Engineers (S) Pte Ltd [1997] 1 SLR 461, HC (refd)

Burford, Burford, Re v Clifford [1932] 2 Ch 122, CA (refd)

Canadian Superior Oil Ltd v Paddon Hughes Development Co Ltd (1970) 12 DLR (3rd Ed) 247, SC (refd)

Davey v Bentinck [1893] 1 QB 185, CA (refd)

Direct Acceptance Finance Ltd v Cumberland Furnishing Pty Ltd [1965] NSWR 1504 (refd)

Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd [1915] AC 847, HL (refd)

Durham Fancy Goods Ltd v Michael Jackson (Fancy Goods) Ltd & Anor [1968] 2 QB 839 (refd)

Empresa Lineas Maritimas Argentinas v The Oceanus Mutual Underwriting Association (Bermuda) Ltd [1984] 2 Lloyd's Rep 517 (refd)

Ewe Keok Neoh v Ooi Soon Tin & Ors [1926] 2 MC 107 (refd)

Farrell v Secretary of State for Defence [1980] 1 WLR 172; [1980] 1 All ER 166, HL (refd)

Goulston Discount Co Ltd v Clark [1967] 2 QB 493, CA (refd)

Lewis v Packer [1960] 1 WLR 452, Ch D (refd)

Philipps v Philipps & Ors (1878–79) 4 QBD 127 (refd)

S Pathmanathan v Amaravathi & Ors [1979] 1 MLJ 38, HC (refd)

Stag Line Ltd v Tyne Shiprepair Group Ltd & Ors (The 'Zinnia') [1984] 2 Lloyd's Rep 211 (refd)

TT Martech Sdn Bhd v Wing Construction (M) Sdn Bhd [2005] 2 MLJ 463, HC (refd)

United Dominions Trust (Commercial), Ltd v Eagle Aircraft Services, Ltd;

United Dominions Trust (Commercial), Ltd v Eagle Aviation, Ltd [1968] 1 All ER 104, CA (refd)

West Rand Central Gold Mining Co Ltd v The King [1905] 2 KB 391, DC (refd)

Whittington v Seale-Hayne (1899–1900) 82 LT 49; 16 TLR 181 (refd)

Yeoman Credit Ltd v Latter [1961] 1 WLR 828, CA (refd)

Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152, SC (refd)

Legislation referred to

Rules of the High Court 1980 O 1 r 4, O 16 r 8, O 45, O 46, O 47, O 48, O 49, O 50, O 51, O 52

Lim Chong Leong (Azam Lim & Ping) for the plaintiff.

Dhiren Norendra (Saroop Rampal with him) (Norendra & Yap) for the first defendant.

Umisalamah bt Abdul Latiff (Azra Salleh & Co) for the second defendant.

Abdul Malik Ishak J (now JCA):

INTRODUCTION

[1] After a full trial, I dismissed the plaintiff's claims against both the first and second defendants with costs. I now give my reasons for doing so.

[2] Judgment in default was obtained against the third defendant (Vital Field Sdn Bhd) on 26 August 2003 and the third defendant did not contest this suit. This judgment concerned the plaintiff (Artic Building and Civil Engineering Sdn Bhd) who sued the first defendant (Ahmad Zaki Sdn Bhd) and the second defendant (Peremba Construction Sdn Bhd) for the sum of RM587,029.63.

THE PLAINTIFF'S CASE

[3] For this exercise, it would be ideal to refer to the amended statement of claim of the plaintiff dated 1 June 2000 as seen in the bundle of pleadings. There the plaintiff stated that its claim was for goods sold and delivered at the request and on the instructions of the third defendant for the purpose of the development project for which the first and second defendants were the main contractors, while the third defendant was appointed as a sub-contractor by the first and second defendants who acted together in a joint venture. The goods which the plaintiff sold and delivered at the request of the third defendant were sand and earth for the development project.

THE FIRST DEFENDANT'S DEFENCE

[4] Again, reference to the first defendant's defence in the bundle of pleadings would certainly be helpful.

[5] The first defendant advanced two lines of defence, namely:

(a) that at all material times, the first defendant was not personally involved in the development project and that pursuant to a joint venture agreement dated 27 December 1997 and a '*supplemental*' joint venture agreement dated 30 December 1997 signed between the first and the second defendants, it was agreed that the second defendant would be solely responsible for the execution of the development project and that the second defendant would further indemnify the first defendant against all losses, damages, claims and proceedings arising thereof; and

(b) that at all material times, it was the third defendant who had appointed the plaintiff to supply the sand and the earth for the development

project and, consequently, both the first and the second defendants were not liable for the contracts entered by the third defendant with the plaintiff.

THE SECOND DEFENDANT'S DEFENCE

[6] The amended statement of defence of the second defendant averred that it was the third defendant who had appointed the plaintiff to supply the sand and the earth for the development project. That by way of a letter dated 25 July 1998, the third defendant informed the second defendant that payment should be made directly to the third defendant. Consequently, the second defendant had settled and paid directly to the third defendant the whole amount of the development project. It was averred by the second defendant that the third defendant had admitted receiving the payment for the development project from the second defendant and relinquished any liabilities arising from any actions against the second defendant. It was also averred that the plaintiff had admitted in a letter dated 11 June 1998 when making a direct demand to the third defendant that payment should be made by the third defendant to the plaintiff. That letter dated 11 June 1998 can be seen at p 38 of the bundle of documents and it was worded as follows:

Vital Field Sdn Bhd

K–233 Jalan Penghiburan

24000 Chukai

Kemaman

Terengganu Darul Iman

11.6.1998

Attn: Haji Mohd Bin Uwil

Dear Sirs,

CLAIM FOR PAYMENT

We refer to the meeting held on 8 June 1998 at Peremba Construction — Ahmad Zaki Sdn Bhd JV (PCAZ) site office wherein PCAZ instructed Vital Field Sdn Bhd (VFSB) to pay VFSB's suppliers directly instead although Letter of Undertaking was given by you and accepted by PCAZ.

Accordingly we hereby request you to settle the amount of RM243,830.62 (Ringgit Malaysia: Two Hundred Forty Three Thousand Eight Hundred Thirty and Sixty Two Sen Only) due to us by 20 June 1998 (Saturday).

Yours faithfully,

ARTIC BUILDING AND CIVIL ENGINEERING SDN BHD

Sgd: (Illegible)

LEE FOO CHONG

Director

cc: Peremba Construction — Ahmad Zaki Sdn Bhd JV

Lot 3895 Jalan Besar Kerteh, Paka

24200 Kerteh, Terengganu

Attn: Encik Hishamuddin Abu Bakar

(Project Manager).

[7] The second defendant also averred, in the alternative, that this action should be instituted by the plaintiff against the third defendant and that the second defendant should not be made a party to this action.

PLEADINGS

[8] The purpose of pleadings is too well known. It is to enable the opposing party to know the case against him. It is to define the issues and inform the parties in advance what they have to meet and at the same time enable them to take the necessary steps to deal with it (*Farrell v Secretary of State for Defence* [1980] 1 WLR 172 at p 180; [1980] 1 All ER 166 at p 173. All the material facts on which the parties rely for the purpose of establishing a claim or defence or counterclaim are pleaded. Only an action commenced by writ would require pleadings to be filed. The term '*pleading*' excludes a petition, summons or preliminary act (O 1 r 4 of the Rules of the High Court 1980 ('RHC'); and the case of *Lewis v Packer* [1960] 1 WLR 452). Only a statement of claim whether indorsed on the writ of summons (*Anlaby & Ors v Praetorius* (1888) 20 QBD 764) or served separately; a defence; a counterclaim; a reply to the defence; and a reply to the counterclaim are known and form part of the pleadings (*Davey v Bentinck* [1893] 1 QB 185).

[9] The court is not entitled to make a decision on an issue which has not been raised by the parties in their pleadings (*Banner Investments Pte Ltd v Hoe Seng Metal Fabrication & Engineers (S) Pte Ltd* [1997] 1 SLR 461). And with these brief insights on pleadings, I shall now proceed to analyse the evidence adduced before me.

ANALYSIS

[10] At the outset, I must categorically say and hold that the plaintiff has failed to prove its case against the first and the second defendants on the balance of probabilities.

[11] It cannot be denied that the plaintiff was appointed by the third defendant. This finds ample support from para 4 of the amended statement of claim which says:

> (4) Upon the request of the 3rd defendant, and upon the agreement of the joint venture known as Peremba Construction — Ahmad Zaki Sdn Bhd JV ('the said JV') where the 1st and 2nd defendants are partners to each other in the JV, the plaintiff supplied sand and earth for the development project on Lot PY 5606 and PT 3895, Industrial Area, District Kemaman, Terengganu.

[12] Even the third defendant's letters of appointment to the plaintiff categorically showed that it was the third defendant who appointed the plaintiff to supply sand and earth to the development project. The first letter dated 19 March 1998 in regard to the supply of sand can be seen at p 4 of the bundle of documents and it was worded as follows:

> Vital Field Sdn Bhd
>
> K–233 Jalan Penghiburan
>
> 24000, Chukai, Kemaman
>
> Terengganu.
>
> 19 Mac 1998
>
> Artic Building And Civil Engineering S/B
>
> Unit 43–2–15, Jalan 1/48A
>
> Sentul Perdana
>
> Bandar Baru Sentul
>
> 51000 Kuala Lumpur
>
> Tuan,
>
> PER: PERLANTIKAN SEBAGAI PEMBEKAL PASIR
>
> Adalah ini dimaklumkan bahawa kami telah mendapat kontrak daripada PEREMBA CONSTRUCTION SDN BHD bagi menjalankan kerja-kerja penyediaan tapak di kawasan perindustrian Kerteh, Kemaman. Projek ini memerlukan sejumlah besar pasir sebagai salah satu keperluan utama untuk menyiapkan projek tersebut.
>
> Maka dengan ini, kami bersetuju melantik syarikat tuan sebagai salah satu pembekal pasir bagi projek berikut dengan persetujuan bersama syarat-syarat di bawah:
>
> 1 harga bagi (RM11.00) per cum;

2 masaalah jalan raya dan kerosakan pengangkutan adalah tanggungjawab pihak tuan;

3 pembekalan minyak juga di bawah kawalan syarikat tuan;

4 pembayaran akan dibuat sebulan sekali; dan

5 pembayaran royalti ditanggung oleh pihak tuan.

Pembekalan pasir daripada syarikat tuan boleh diteruskan selagi pasir-pasir ini diperlukan bagi penyiapan projek tersebut.

Kerjasama dan persetujuan yang wajar daripada pihak tuan amatlah diharapkan.

Sekian, terima kasih.

Yang benar

VITAL FIELD SDN BHD

Sgd: (Illegible)

Pengarah Urusan

Dipersetujui oleh

Artic Building And Civil

Engineering S/B

Sgd: (llegible)

Pengurus.

[13] The second letter dated 19 March 1998 in regard to the supply of red earth can be seen at p 5 of the bundle of documents and it was worded in this way:

Vital Field Sdn Bhd

K–233 Jalan Penghiburan

24000, Chukai, Kemaman

Terengganu.

19 Mac 1998

Artic Building And Civil Engineering S/B

Unit 43–2–15, Jalan 1/48A

Sentul Perdana

Bandar Baru Sentul

51000 Kuala Lumpur

Tuan,

PER: PERLANTIKAN SEBAGAI PEMBEKAL TANAH MERAH

Adalah ini dimaklumkan bahawa kami telah mendapat kontrak daripada PEREMBA CONSTRUCTION SDN BHD bagi menjalankan kerja-kerja penyediaan tapak di kawasan perindustrian Kerteh, Kemaman. Projek ini memerlukan sejumlah besar tanah merah sebagai salah satu keperluan utama untuk menyiapkan projek tersebut.

Maka dengan ini, kami bersetuju melantik syarikat tuan sebagai salah satu pembekal tanah merah bagi projek berikut dengan persetujuan bersama syarat-syarat di bawah:

1 harga bagi (RM5.40) per cu meter;

2 masaalah jalan raya dan kerosakan pengangkutan adalah tanggungjawab pihak tuan;

3 pembekalan minyak juga di bawah kawalan syarikat tuan;

4 pembayaran akan dibuat sebulan sekali; dan

5 pembayaran royalti ditanggung oleh pihak tuan.

Pembekalan tanah merah daripada syarikat tuan boleh diteruskan selagi tanah-tanah merah ini diperlukan bagi penyiapan projek tersebut.

Kerjasama dan persetujuan yang wajar daripada pihak tuan amatlah diharapkan.

Sekian, terima kasih.

Yang benar

VITAL FIELD SDN BHD

Dipersetujui oleh

Artic Building And Civil

Engineering S/B

Sgd: (Illegible)

Pengarah Urusan

Sgd: (llegible)

Pengurus.

[14] The plaintiff's first witness was Lee Foo Chong @ Li Foo Chong (*PW1*) ('*Lee Foo Chong*') and in his witness statement this was what he said (see exh '*PWS–1*' at p 3):

Q6: What was the relationship between the Plaintiff and the Defendants?

A: The Joint Venture partnership between the 1st and 2nd Defendants was the main contractor where the 3rd Defendant was their sub-contractor who engaged the Plaintiff for the supply of sand and earth to the project. I make reference to pages 4 and 5 of the Bundle of Documents as evidence of the Plaintiff's appointment by the 3rd Defendant.

[15] And under cross-examination, Lee Foo Chong also confirmed the same story (see p 7 of the notes of evidence):

> Q: Earlier you confirmed that the plaintiff was appointed by the 3rd defendant?
>
> A: Yes.

[16] Wan Zakariah bin Wan Muda (*DW1*) (hereinafter referred to as '*Wan Zakariah*') testified for the first defendant and under cross-examination this was what he said (see p 26 of the notes of evidence):

> Q: Based on these documents do you agree that the plaintiff was appointed by the 3rd defendant?
>
> A: Yes.

[17] Again, Hishamuddin bin Abu Bakar (*DW2*) ('*Hishamuddin*') who testified for the second defendant confirmed that the plaintiff was appointed by the third defendant. This was what Hishamuddin said in his witness statement (see second *DWS*):

> Q9: What was the relation(ship) between the Third Defendant and the Plaintiff?
>
> A: Plaintiff was the company appointed by the Third Defendant vide a Letter of Agreement dated 19 March 1998 to supply sand and laterite for the said Project which was being carried out by the First Defendant and Second Defendant (hereinafter referred to as the 'said Agreement').

[18] On the evidence, it is part and parcel of my judgment that the plaintiff has no contractual nexus with the first and second defendants. And so, as the night follows the day, the first and second defendants cannot be held liable for the debts of the third defendant. Indeed this fact was conveyed by the second defendant to the plaintiff's solicitors by way of a letter dated 4 March 1999 and that letter was worded in this way (see p 41 of the bundle of documents):

> 4th March, 1999
>
> Messrs Azam Lim & Pang
>
> Advocates & Solicitors
>
> 8th Floor, Wisma TAS
>
> 21, Jalan Melaka
>
> 50100 Kuala Lumpur
>
> Dear Sirs,

PROPOSED SITE DEVELOPMENT FOR PVC/VCM/CUF PROJECT ON THE SITE AT LOT NO 4593, PT 5608 AND PART PF PT 3895, KERTIH INDUSTRIAL AREA, MUKIM KERTIH, TERENGGANU DARUL IMAN

NOTICE OF DEMAND

Peremba Construction Sdn Bhd — Ahmad Zaki Sdn Bhd JV

We refer to your letter dated 9th February, 1999 in respect of the above matter.

Kindly be informed that Peremba Construction — Ahmad Zaki Sdn Bhd JV has no contractual relationship with your client, Artic Building and Civil Engineering Sdn Bhd in respect of the said project and we have been made to understand that your client was engaged by Vital Field Sdn Bhd ('VFSB') as a supplier of sands for the said project.

We have been informed that the letter of 19th March, 1998 which you referred to in your abovesaid letter was subsequently revoked by VFSB vide letter dated 25th July, 1998 and the joint venture was notified of the same. In the circumstances, it is therefore obvious that the joint venture has no contractual obligation to make any direct payment to your client and furthermore the joint venture was never privity to such arrangement.

Any claim that your client may have for goods sold and delivered has therefore to be addressed and directed to VFSB.

Thank you.

Yours faithfully,

PEREMBA CONSTRUCTION SDN BHD

Sgd: (Illegible)

MOHD FADZIL AB HAMID

Head of Contracts.

[19] A person who is not a party to a contract has no right to sue on the contract. Put differently, a contract cannot confer rights or impose obligations arising under it to any person except the parties to the contract itself. Factual difficulties may arise in identifying those persons who were involved in the contract (*Stag Line Ltd v Tyne Shiprepair Group Ltd & Ors (The 'Zinnia')* [1984] 2 Lloyd's Rep 211; and *Empresa Lineas Maritimas Argentinas v The Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1984] 2 Lloyd's Rep 517), but these factual difficulties can easily be resolved and cannot be construed as raising questions of legal principles nor create legal impediments under the contract.

[20] Lord Haldane LC affirmed the doctrine of privity authoritatively in the case of *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847, at p 853, in this way:

> … in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a jus quaesitum tertio arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in personam. A second principle is that if a person with whom a contract not under seal has been made is to be able to enforce it consideration must have been given by him to the promisor or to some other person at the promisor's request.

[21] Lee Foo Chong gave evidence that there were letters dated 19 March 1998 as seen at pp 6 and 7 of the bundle of documents which showed that the third defendant had informed the joint venture company of the plaintiff's appointment and requested that the plaintiff be paid for the supply of the sand and the earth from the account which the third defendant had with the joint venture company. But, unfortunately, these letters which were described as the letters of undertaking were not pleaded by the plaintiff and, consequently, the plaintiff must be precluded from relying on those letters to found its claim against the first and the second defendants. This is the correct approach to adopt. What was not pleaded cannot be considered by this court. Gunn Chit Tuan SCJ speaking for the Supreme Court in the case of *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152 (SC), in allowing the plaintiff's appeal there said that as the trial court had made a decision on an issue which was not raised by the parties in their pleadings, the appeal must be allowed and the order of the learned judge in dismissing the plaintiff's claim be set aside.

[22] But these so called letters of undertaking were merely a request for the first and the second defendants to pay to the plaintiff for the supply of sand and earth at the request of the third defendant from monies owing by the first and the second defendants to the third defendant ('*the request to pay the plaintiff*'). And this very fact was agreed to by Lee Foo Chong during cross-examination as seen at p 7 of the notes of evidence and the exchange was like this:

> Put: That the letters at page 6 and page 7 of Bundle 'A' serve as a request from the third defendant to the joint venture to pay the plaintiff based on the terms stated in these letters.
>
> A: Yes.

[23] At any rate, the alleged letters of undertaking contained conditions which had to be adhered to by the plaintiff. But, unfortunately, the plaintiff failed to show and/or prove by way of documentary evidence or even by way of oral evidence through Lee Foo Chong that the conditions contained in both the letters of undertaking had been complied with. Under

cross-examination, Lee Foo Chong agreed that the request to pay the plaintiff was subject to the terms stipulated in the letters of undertaking.

[24] There was evidence that any monies to be paid to the plaintiff would be deducted from the third defendant's account with the plaintiff. This meant that all monies that were due to the third defendant from the joint venture would be channelled to the plaintiff. This fact was agreed to by Lee Foo Chong when he was cross-examined. The notes of evidence at pp 11–12 would bear this out:

> Q: You have said that these letters at page 6 and page 7 of Bundle 'A' set out that payment should be made by the joint venture directly to the plaintiff through the deductions from the 3rd defendant's account. Do you agree?
>
> A: Yes, I agree.
>
> Q: Do you agree that these terms are stated in paragraphs 13 and 14 of the letters at pages 6 and 7 of Bundle 'A'?
>
> A: Yes, I agree.
>
> Q: Do you agree that the plaintiff has also agreed to all the terms as stated at pages 6 and 7 of Bundle 'A' and thereby signed those letters accordingly?
>
> A: Yes, I agree.

[25] It would be pertinent to mention that both the alleged letters of undertaking were subsequently revoked by the third defendant and the plaintiff accepted this revocation. There was documentary evidence to support such a revocation. The third defendant had by its letter dated 25 July 1998 revoked the earlier letters of undertaking. And this letter dated 25 July 1998 can be seen at p 39 of the bundle of documents and it was worded as follows:

> Tarikh: 25hb Julai 1998.
>
> Peremba Construction — Ahmad Zaki Sdn Bhd JV
>
> Lot 3895, Jalan Besar, Kerteh, Paka,
>
> 23200 Kerteh, Terengganu.
>
> (up: En Hishamuddin b Abu Bakar.)
>
> Tuan,
>
> Per: Pembatalan Bayaran Kepada Artic Building And Civil Engineering Sdn Bhd
>
> Surat dari Artic Building And Civil Engineering Sdn Bhd (Ruj No: ABCE/35/98) bertarikh 21hb Julai 1998 adalah dirujuk.
>
> Dimaklumkan bahawa syarikat ini telah membatalkan segala urusniaga dengan syarikat berkenaan. Perkara ini telah dimaklumkan kepada En Lee Foo Chong dari syarikat berkenaan melalui satu perbincangan pada bulan Jun 1998 baru-baru ini di pejabat kami.

(Oleh yang) demikian, segala bayaran kerja hendaklah dibayar terus kepada Vital Field Sdn Bhd.

Di atas kerjasama tuan saya dahului dengan ucapan ribuan terima kasih.

Sekian.

'BERGERAK MENUJU WAWASAN'

For Vital Field Sdn Bhd.

Sgd: (Illegible)

(HAJI MOHD BIN UWIL)

Pengarah Urusan.

sk: Artic Building And Civil Engineering Sdn Bhd,

Unit 43–2–15, Jalan 1/48A, Sentul Perdana,

Bandar Baru Sentul,

51000 KUALA LUMPUR.

[26] The same fact was also conveyed to the plaintiff by way of the second defendant's letter addressed to the plaintiff's solicitors dated 4 March 1999 as seen at p 41 of the bundle of documents as reproduced earlier.

[27] And the plaintiff too had by virtue of its letter dated 11 June 1998 as seen at p 38 of the bundle of documents and as produced earlier agreed to this revocation when it wrote to the third defendant demanding for payment of the amount outstanding. It was for this reason that the first defendant argued that the plaintiff was now estopped from denying that the alleged letters of undertaking were subsequently revoked by the third defendant and agreed to by the plaintiff. Arising from this, the plaintiff too was estopped from claiming any balance outstanding from the joint venture company.

[28] The doctrine of estoppel is not only limited to a contractual relationship, it would also apply to any legal relationship (*Durham Fancy Goods Ltd v Michael Jackson (Fancy Goods) Ltd & Anor* [1968] 2 QB 839; *Canadian Superior Oil Ltd v Paddon Hughes Development Co Ltd* (1970) 12 DLR (3rd Ed) 247; and *S Pathmanathan v Amaravathi & Ors* [1979] 1 MLJ 38); and in the instant case, grounded on a contractual relationship, it should be applied vigorously.

[29] In my judgment, the plaintiff's claims against both the first and the second defendants are entirely baseless, an afterthought and was due to the plaintiff's failure to claim from the third defendant who was the rightful contracting party. In his witness statement by way of a reply to question 7,

Lee Foo Chong alleged that there was a special term allegedly insisted upon by the plaintiff before it agreed to be appointed by the third defendant. This was how question 7 was worded in Lee Foo Chong's witness statement and his answer thereto:

> Q7: Was there any special term that the plaintiff insisted on before it agreed on the appointment?
>
> A: Yes. We had insisted that the Joint Venture partnership pay the plaintiff direct and not through the third defendant. I make reference to pages 6 and 7 of the Bundle of Documents.

[30] The reply to question 7 by Lee Foo Chong in his witness statement can best be described as the '*alleged special term*' for the simple reason that it was not mentioned in the letters of appointment dated 19 March 1998 as seen at pp 4 and 5 of the bundle of documents which have been reproduced earlier. Even the joint venture company had no knowledge of and had never agreed to the alleged special term. And this is clearly borne out in the cross-examination of Lee Foo Chong as seen at p 7 of the notes of evidence:

> Q7 of PWS–1 shown and he is asked —
>
> Put: The joint venture has no knowledge of your ie the plaintiff's insistence and that the request came from the 3rd defendant.
>
> A: Yes.

[31] Lee Foo Chong also agreed under cross-examination that the plaintiff demanded payment from the first and the second defendants when their demand against the third defendant failed. The notes of evidence at p 10 reflected the plaintiff's attitude and the exchange went like this:

> Page 38 of Bundle 'A' shown and he is asked (as well as page 39 of Bundle 'A'):
>
> Put: That because the plaintiff's demand against the 3rd defendant failed the plaintiff instructed the solicitors to issue the letter of demand as per page 40 and page 41 of Bundle 'A', do you agree?
>
> A: Yes, I do.

[32] The second defendant just like the first defendant argued, quite rightly, that the plaintiff was appointed by the third defendant and the plaintiff's recourse should be against the third defendant and not against the first defendant or the second defendant.

[33] It is my judgment that the second defendant had made the payment for the development project and there was no basis for the plaintiff's claim against the second defendant. A letter from the third defendant to the second defendant dated 1 April 1998 entitled '*Letter of Indemnity*' explained the situation in its correct perspective. That was not an April fool's letter but it was a letter of indemnity evidencing the final payment of the sum of RM1.1m by the second defendant to the third defendant. And that letter of indemnity can be seen at p 42 of the bundle of documents and it was worded as follows:

VITAL FIELD SDN BHD

To,

Peremba Construction Sdn Bhd

4th Floor, Block A

Saujana Resort

Seksyen U2

40150 Shah Alam

Selangor Darul Ehsan

LETTER OF INDEMNITY

In CONSIDERATION of your releasing the final payment of Ringgit Malaysia One Million One Hundred Thousand only (RM1,100,000.00) to us in respect of goods and services supplied by us and/or appointed suppliers/sub-contractors to you in relation to the PVC/VCM/CUF Kerteh development project at Lot PT4593, Lot PT 5608 and part of PT3895, Kerteh Industrial Area, District of Kemaman, Terengganu ('the said project') we, VITAL FIELD SDN BHD (Company Registration No 260275-K) HEREBY AGREE AND UNDERTAKE TO INDEMNIFY and hold you harmless as the main contractor for the said Project from all financial claims arising from all and any of the said suppliers/sub-contractors for goods and services supplied for the said Project.

Dated the 1st day of April 1998

Signed by VITAL FIELD SDN BHD

In the Presence of

Chairman: Sgd. (Illegible)

Name: Raja Sulaiman

Director: Sgd (Illegible)

Name: Mohd bin Uwil.

[34] There was a letter from the second defendant to the third defendant dated 1 September 1999 and in that letter the second defendant enclosed a cheque in the sum of RM965,471.62 to the third defendant and at the same time imploring the third defendant to settle the debts to the suppliers and subcontractors. That letter can be seen at p 43 of the bundle of documents and it was worded as follows:

PEREMBA

Date: 1st September 1999

VITAL FIELD SDN BHD

K–233, Jalan Penghiburan,

24000 Chukai,

Kemaman,

Terengganu Darul Iman

Attn: YM Raja Sulaiman Bin Raja Dato' Abdul Wahid

Dear Sir,

RELEASE OF PAYMENT

We refer to the above matter.

Enclosed herewith please find our BBMB cheque numbers 000138, 000139 and 000140 respectively for the total sum of RM965,471.62 for your necessary action.

Our release of the abovesaid payment is in view of your Letter of Revocation for the revocation of the direct payments to your suppliers/sub-contractors by us and your Letter of Indemnity. In the circumstances, we hereby urge you to undertake to settle all outstanding payments due and owing to your suppliers/sub-contractors mentioned in your above letter amounting to approximately RM2.7 million. Some of your said suppliers/sub-contractors have already commenced legal action against us.

Thank you.

Yours faithfully,

PEREMBA CONSTRUCTION SDN BHD

Sgd: (Illegible)

MOHD FADZIL AB HAMID

Head of Contracts

We acknowledge receipt of the above cheques and hereby undertake to take (the) necessary actions to resolve the amount due and owing to our suppliers/sub-contractors mentioned in our Letter of Revocation.

Sgd (Illegible)

A Raja Sulaiman Bin Raja Dato' Abdul Wahid

Vital Field Sdn Bhd.

B **[35]** Now, both these two letters showed that the second defendant had made full payment to the third defendant under the contract. What the plaintiff should do would be to proceed against the third defendant by way of execution since judgment in default was obtained against the third defendant on 26 August 2003. Orders 45–52 of the RHC deal with rules of procedure and the machinery for the successful party to obtain satisfaction of
C a judgment or order or compelling compliance or disobedience thereto. These rules must be read together and when so read it would provide the successful party with several modes of enforcement available at his disposal.

D **[36]** The fact that the second defendant had made the full payment for the development project to the third defendant remained undisputed and uncontested by the plaintiff.

E **[37]** The amount claimed by the plaintiff has not been consistent. In the amended statement of claim a sum of RM587,029.63 was mentioned. The plaintiff's statement of account dated 31 May 1998 as reflected at p 37 of the bundle of documents showed the sum of RM587,029.63. But in the plaintiff's letter dated 11 June 1998 as reproduced earlier, a sum of RM RM243,830.62 was recorded. And Lee Foo Chong under cross-examination
F agreed that the amount claimed was inconsistent with the letter dated 11 June 1998 (see p 15 of the notes of evidence). Again, when Lee Foo Chong was re-examined, he failed to give a satisfactory answer as to why the amount was different. He merely stated, under re-examination that the amount was lesser
G because it involved three invoices but he did not explain as to why the amount was confined to the three invoices. In my judgment, all these inconsistencies created serious doubts on the validity of the plaintiff's claims against the first and second defendants.

H **[38]** Undaunted, the plaintiff asserted that the assignment of the debt cannot absolve both the first and the second defendants from liability. But, with respect, there was no assignment for this court to consider. It was entirely baseless and misconceived on the part of the plaintiff to allege the existence of the assignment of the debt. The plaintiff failed to prove that there
I was an assignment. In my judgment, it was more in the nature of an arrangement of the mode of payment. It certainly was not an assignment as envisaged under the law. Moreover, the plaintiff was quite content with the arrangement and did not issue any letter to object to the new method of arrangement for payment.

[39] The case of *TT Martech Sdn Bhd v Wing Construction (M) Sdn Bhd* [2005] 2 MLJ 463, concerned an assignment of debts. In that case the plaintiff had sold and supplied goods to the defendant in order for the defendant to complete its contract with the Lembaga Pelabuhan Johor ('LPJ'). And pursuant to a deed of assignment between the parties, the defendant had, inter alia, unconditionally assigned absolutely to the plaintiff monies which was owed and to be paid by LPJ to the defendant pursuant to the contract to the extent of the price of the goods supplied by the plaintiff. Subsequently, LPJ terminated its contract with the defendant and refused to make payment to the plaintiff for the amount owed by the defendant. The plaintiff then sued the defendant for the sum owing. The defendant submitted that, pursuant to the deed of assignment, they ought to proceed against LPJ for the debt owing. In allowing the plaintiff's claim, the court held that the assignment did not absolve the defendant from its liability to pay for the goods which had been delivered by the plaintiff. The court also held that a perusal of the assignment would show that there was no agreement to release the defendant's liability to pay in the event LPJ did not pay. And since the plaintiff has not been paid by LPJ, the court ruled that the plaintiff was entitled to claim against the defendant as per the suit.

[40] In the case before me, there was no deed of assignment at all. That would take this case away from *TT Martech*.

[41] Here, there was a notice of indemnity dated 19 October 2000 filed by the first defendant against the second defendant. That must also be considered by me in deciding this case. It is only in a situation where I find that the plaintiff has established its case against both the first and second defendants, on the balance of probabilities, that an order be made that the second defendant indemnifies the first defendant. But I will not give judgment to the plaintiff. The overwhelming evidence weighed heavily in favour of both the first and second defendants, on the balance of probabilities. However, it cannot be denied that the notice of indemnity should be read in favour of the first defendant.

[42] Be that as it may, the first defendant was not involved in the development project. And that pursuant to a joint venture agreement dated 27 December 1997 and a '*supplemental*' joint venture agreement dated 30 December 1997 signed between the first and the second defendants, it was agreed that the second defendant would be solely responsible for the execution of the development project and would further indemnify the first defendant against all losses, damages, claims and proceedings arising from the development project.

[43] Clause 2 of the '*supplemental*' joint venture agreement dated 30 December 1992 provides as follows:

> (2) AHMAD ZAKI has agreed and refrained from any participation in the implementation of the PROJECT. PEREMBA shall indemnify and at all times hold AHMAD ZAKI fully and effectively indemnified against all claims, damages, losses, demands, proceedings, actions, costs and expenses incurred by AHMAD ZAKI and/or the Joint Venture or which AHMAD ZAKI and/or the Joint Venture may sustain or incur or which may be brought or established against AHMAD ZAKI and/or the Joint Venture by any party howsoever and whatsoever (including liquidated and ascertained damages) as a consequence direct or indirect by reason of or arising out of any breach, non-observance or non-performance by PEREMBA and/or the Joint Venture, their respective servants or agents sub-contractors of any provisions of the Joint Venture Agreement or the provisions of the Contract on the part of the Joint Venture to observe and comply or otherwise in the implementation and execution of the Works.

[44] By virtue of O 16 r 8 of the RHC, the first defendant had issued a notice of indemnity dated 19 October 2000 against the second defendant and that notice was served on the second defendant on 20 October 2000. An affidavit of service of J Mahendran a/l Jaya Vital that was affirmed on 23 October 2000 and filed in this court on 2 November 2000 would bear testimony to this (*In re Burford, Burford v Clifford* [1932] 2 Ch 122; and *Ewe Keok Neoh v Ooi Soon Tin & Ors* [1926] 2 MC 107).

[45] In the second defendant's amended statement of defence, no mention at all was made by the second defendant in regard to the first defendant's averments in the first defendant's statement of defence that the second defendant would, at all material times, indemnify fully all losses, damages, claims and proceedings that would be or may be brought against the first defendant. That would surely be construed in favour of the first defendant.

[46] And by virtue of the notice of indemnity, the first defendant was claiming full indemnity from the second defendant in respect of any order and/or judgment that may be pronounced by this court in respect of this suit, including costs on a solicitor-client basis as per the provisions of paras 3(a), 3(b) and 3(c) of the said notice of indemnity. It goes without saying that this court has all the powers and jurisdiction to make an order in respect of the indemnity bearing in mind the evidence put forth by the first defendant through Wan Zakariah and the documentary evidence thereof.

[47] The first defendant was only interested in being indemnified by the second defendant in the unlikely event that this court were to find in favour of the plaintiff. But, as I said, I would not give judgment to the plaintiff. At any rate the indemnity clause imposed a contractual duty on the second defendant to fully indemnify the first defendant including costs on a solicitor-client basis.

[48] As against the second defendant, the first defendant wanted to be indemnified. It was not a case where the first defendant was seeking damages against the second defendant in the unlikely event that this court were to give judgment in favour of the plaintiff. The distinction between indemnity and damages is illustrated by the case of *Whittington v Seale-Hayne* (1899–1900) 82 LT 49; 16 TLR 181. In that case, the plaintiffs took a lease of certain premises on the strength of the defendant's innocent misrepresentation that they were in a sanitary condition and they erected certain poultry sheds thereon. As a result of the insanitary state of the premises, the manager of the plaintiffs' poultry farm became ill. The poultry also died. The local council ordered the plaintiffs to remove the drains. The plaintiffs were also asked to remove their sheds. In an action for rescission and for an indemnity against the consequences of having entered into the contract, the court held that the plaintiffs were entitled to an indemnity against the obligations to pay rates and to effect the necessary repairs because these were necessarily assumed under the contract. But the plaintiffs were not entitled to recover in respect of the medical expenses or loss of poultry or the removal of the sheds because these were in the nature of damages.

[49] An obligation imposed by operation of law or by contract on one person to make good a loss suffered by another is called an indemnity. It is purely a question of construction in each case before a contract of indemnity is identified (*Yeoman Credit Ltd v Latter* [1961] 1 WLR 828 (CA)). Thus, a contract by which a dealer agrees to indemnify a finance company against losses arising from a consumer credit contract has been held by the courts in *Direct Acceptance Finance Ltd v Cumberland Furnishing Pty Ltd* [1965] NSWR 1504; *Goulston Discount Co Ltd v Clark* [1967] 2 QB 493; and *United Dominions Trust (Commercial), Ltd v Eagle Aircraft Services, Ltd*; *United Dominions Trust (Commercial), Ltd v Eagle Aviation, Ltd* [1968] 1 All ER 104 (CA) to be an indemnity.

[50] Here, between the first defendant and second defendant, it was a simple case of an indemnity where the second defendant has to indemnify the first defendant by virtue of cl 2 of the '*supplemental*' joint venture agreement dated 30 December 1992.

[51] This case demonstrates the importance of pleading all the material facts on which the plaintiff proposes to rely at the trial, otherwise the plaintiff is not entitled to give any evidence of them at the trial. This was what had happened here. Suffice to say that no averment must be omitted which is essential to the plaintiff's success (*West Rand Central Gold Mining Co Ltd v The King* [1905] 2 KB 391; and *Ayers v Hanson* [1912] WN 193). Indeed Brett LJ in *Philipps v Philipps & Ors* (1878–79) 4 QBD 127, at p 133 aptly said that:

> If parties were held strictly to their pleadings under the present system they ought not to be allowed to prove at the trial, as a fact on which they would have to rely in order to support their case, any fact which is not stated in the pleadings.

[52] Be that as it may, the evidence here weighed heavily against the plaintiff. I will not give judgment to the plaintiff. The notice of indemnity would certainly absolve the first defendant from the plaintiff's claim entirely. This would be my judgment and I so hold accordingly.

[53] For all these varied reasons, I dismissed the plaintiff's claims against the first and the second defendants with costs.

Plaintiff's claim dismissed with costs.

Reported by Kohila Nesan